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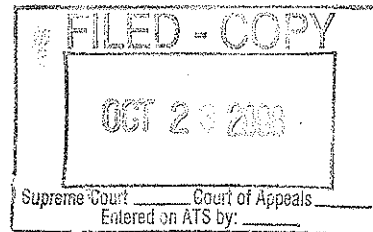
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 FARON STONE,)
)
 Defendant-Appellant.)
 _____)
 FARON STONE,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent-Respondent.)
 _____)

S.Ct. No. 34569 & 34571



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Sixth Judicial District of the State of Idaho
 In and For the County of Bannock

HONORABLE WILLIAM H. WOODLAND
 District Judge

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II. ARGUMENT IN REPLY

A. The District Court Erred in Applying the Incorrect Standard in Deciding the Motion to Withdraw the Guilty Pleas.

In the Opening Brief, Mr. Stone argued that the District Court's denial of the motion to withdraw the guilty pleas must be reversed because the District Court abused its discretion by failing to apply the appropriate standard to its decision. Appellant's Opening Brief at pages 15-17. In its response, the State has not addressed this argument.

In its brief at pages 6-7, the State agrees with Mr. Stone that when a defendant seeks to withdraw a guilty plea, the court must first determine whether the plea was constitutionally valid. If not, then withdrawal should be allowed. If the plea was constitutionally valid, the court must next determine whether withdrawal should be allowed as a matter of discretion. *State v. Dopp*, 124 Idaho 512, 516, 861 P.2d 82, 86 (Ct. App. 1992); *Jones v. State*, 118 Idaho 842, 844, 801 P.2d 49, 51 (Ct. App. 1990). If a defendant offers a just cause for withdrawal of the plea, the motion should be granted unless the State demonstrates that prejudice would result. *State v. Ballard*, 114 Idaho 799, 801, 761 P.2d 1151, 1153 (Ct. App. 1988), citing *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987). See Appellant's Opening Brief at pages 15-16.

The record is clear that the Court did not apply this standard in denying Mr. Stone's motion to withdraw his plea and the State does not make any attempt to assert the contrary. Tr. _____ 10/19/06 p. 23. See Respondent's Brief at pages 6-10.

Moreover, the law is clear that in reviewing a District Court decision for an abuse of discretion, the appellate court considers: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion

and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *State v. Hanslovan*, ___ Idaho ___, ___ P.3d ___ 2008 WL 2512529 (Ct. App. 2008) (*rev. denied*), citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). Here again, the State has made no attempt to assert that this standard should not be applied in this case. Nor has the State made any attempt to argue that if this standard is applied to this case, there is any way to avoid a finding that the District Court abused its discretion. See Respondent's Brief at pages 6-10. Rather, the State has ignored the abuse of discretion problem and argued only that Mr. Stone failed to prove a factual predicate to support his motion. See Respondent's Brief at page 8.

The State's lack of argument that either the standard set out for a finding of an abuse of discretion does not apply in this case, or that the District Court did indeed act within the boundaries of its discretion and consistently with the legal standards the State itself acknowledges as applicable to the case, leads to the conclusion that the State could not make such an argument. The reasonable conclusion is that there was an abuse of discretion below and that now this Court should reverse the District Court's decision and remand for further proceedings on the motion to withdraw the pleas.

Therefore, Mr. Stone now requests that this Court reverse the order denying his motion to withdraw his guilty plea and remand for further proceedings.

B. The State's Sufficiency of the Evidence Argument is Off Point.

Rather than addressing the fact that the District Court abused its discretion by not applying the proper standard of review to the motion to withdraw the guilty plea, the State focuses on arguing about the sufficiency of the proof for Mr. Stone's reasons for withdrawal of

his plea. The State devotes pages 8-10 of its brief to arguing that the denial of the motion should be affirmed because Mr. Stone did not provide sufficient proof to support his motion. Not only are there several problems with the State's analysis of whether Mr. Stone provided adequate support for his reasons for withdrawal of the guilty pleas, but resolution of the question of whether the District Court abused its discretion in not applying the proper standard to Mr. Stone's motion is not determined by whether the reasons for withdrawal were satisfactorily established.

As discussed above, the District Court erred in not applying the proper standard to the question of whether Mr. Stone's motion to withdraw his guilty pleas should be granted. As this Court is not a fact-finding court, the appropriate remedy is to remand for the District Court to apply the proper standard and make initial findings of fact. *See, State v. Haworth*, 106 Idaho 405, 406-7, 679 P.2d 1123, 1124-25 (1984), wherein the Supreme Court refrained from making findings of fact, instead remanding to the District Court for the missing findings.

The State's argument about the sufficiency of the proof for Mr. Stone's reasons for withdrawal of his plea is not relevant to the question of whether the District Court erred in failing to apply the proper legal standard to the motion. It is the role of the District Court to make the initial findings about the sufficiency of the support for the reasons for withdrawal. It is not this Court's role to step in and make the initial determination. Because the District Court abused its discretion, this Court should reverse the order denying withdrawal of the pleas and remand for further proceedings.

C. The District Court Erred in Finding That the Pleas Were Knowingly and Voluntarily Entered Given They Were Entered Without Knowledge of the Defenses Being Waived.

In his Opening Brief, Mr. Stone argued that the District Court erred not only in failing to apply the proper legal standard to the motion to withdraw the guilty plea, but also erred in finding that the pleas were knowing and voluntary. Appellant's Opening Brief at pages 17-20. The State has not specifically responded to this argument other than indirectly through its assertion that none of the reasons proffered by Mr. Stone for withdrawal were supported by sufficient evidence. Respondent's Brief at pages 6-8. However, Criminal Rule 33 and the case law interpreting it do not establish a minimal level of proof to support an assertion of just cause for withdrawal of a plea.

I.C.R. 33(c) states only: "A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended, but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the defendant's plea." And, the case law likewise does not establish a minimal standard of proof. As set out in *State v. Dopp*, 124 Idaho 512, 515, 861 P.2d 82, 85 (1992), "On appeal, voluntariness of the guilty plea and waiver must be reasonably inferred from the record as a whole." And, "Defendants seeking to withdraw a guilty plea . . . must show a just reason . . . The defendant's failure to present and support a plausible reason will dictate against granting of withdrawal . . ." *Id.* Moreover, the District Court is granted broad discretion to grant or deny a motion to withdraw a plea made before sentencing and is encouraged to exercise that discretion liberally. *State v. Henderson*, 113 Idaho 411, 414, 744 P.2d 795, 798 (Ct. App. 1987).

While the State would like this Court to find that there was some burden of proof which

Mr. Stone failed to carry, the case law does not establish a burden of proof. Mr. Stone set out reasons in his motion filed by counsel to support his request for withdrawal of his plea. The State offered nothing at the hearing on the motion to rebut counsel's allegations. Rather, the prosecutor only argued that the transcript of the plea hearing indicated a knowing and voluntary plea. He did not address questions beyond that and did not rebut or dispute any specific factual claims set out in the motion to withdraw the plea. See Tr. 31-32.

In signing the motion to withdraw the guilty pleas, defense counsel was affirming his good faith in presenting the motion. See, I.R.P.C. 3.1 ("A lawyer shall not bring a proceeding . . . unless there is a basis in law and fact for doing so . . .") and I.R.P.C. 3.3(a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal . . .") See also, *Lester v. Salvino*, 141 Idaho 937, 939-40, 120 P.3d 755, 757-58 (Ct. App. 2005), "The signer's signature certifies that to the best of the signer's knowledge, information and belief after reasonable inquiry, the pleading, motion or other paper is well grounded in fact, warranted by existing law or a good faith argument . . ." See also, I.R.C.P. 11(a). See also, *State v. Rogers*, 143 Idaho 320, 322, 144 P.3d 25, 27 (2006), holding that trial courts have an inherent authority to assess sanctions for bad faith conduct against all parties appearing before them and that a party acts in bad faith when it willfully conducts itself improperly or acts with an improper purpose.

In signing the motion to withdraw the pleas containing an enumeration of reasons supporting withdrawal, counsel was putting those reasons before the Court. While the State could certainly dispute those reasons and offer proof against them, by putting those reasons in the motion for withdrawal of the pleas, counsel had placed those reasons before the Court. Given there is no minimal standard of proof required for the reasons, the State's argument that motion

for withdrawal of the pleas was properly denied “[b]ecause Stone failed to show a single factual predicate of motion to withdraw” is not persuasive. Respondent’s Brief at page 10.

Further, when Mr. Stone’s reasons are considered, they do support a conclusion that the pleas were not knowingly and voluntarily entered. As set out in the Opening Brief at pages 18-20, Mr. Stone made his pleas in ignorance of several possible defenses. In making the pleas, Mr. Stone did not knowingly and intelligently waive his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself. *State v. Dopp*, 124 Idaho at 515, 861 P.2d at 84.

For this reason also, the order denying the motion to withdraw the guilty pleas should now be reversed.

D. The District Court Erred in Denying the Motion to Withdraw the Pleas as the Motion met the Just Cause Standard Even Taking into Account the Motivation for the Motion.

In the Opening Brief, Mr. Stone also argued that the District Court erred in denying the motion to withdraw the pleas because his motion offered just cause for withdrawal. Opening Brief at pages 20-23. Again, the State did not respond directly to this argument. See Respondent’s Brief at pages 5-10.

Rather, the State based its brief upon an assumption that the statements offered in the motion to withdraw concerning the reasons for withdrawal should have been ignored by the District Court because additional proof up to some unspecified standard of proof had not been offered. However, as set out above, there is no minimal standard of proof that Mr. Stone had to meet. He put his reasons before the Court and the Court should have considered them. The State was free to present argument and proof against the reasons, but it chose not to do so. The reasons in support of the motion included that Mr. Stone had not been properly informed by

counsel of the potential defenses to the charges and that he had not been advised of the maximum penalty. And, those reasons, as set out in the Opening Brief at pages 20-23, provided just cause to allow withdrawal of the pleas.

E. The District Court Erred in Imposing an Excessive Sentence.

Mr. Stone was given a sentence that exceeded that recommended by the State by 333%. He has argued that this sentence is excessive, *inter alia*, because the fixed term, given both his age and his circumstances, is longer than his expected life span. Mr. Stone has cited case concerning fixed life terms in support of his argument. Opening Brief at pages 23-26. The State has argued in response that this Court should not consider case law applicable to fixed life terms in assessing the reasonableness of this sentence. Respondent's Brief at pages 11-14.

While Mr. Stone disagrees with the State's assertion that this case law should not be considered in this case, even if that case law is disregarded, his sentence is unreasonable and an abuse of discretion. His sentence is unreasonable because it exceeds that needed to satisfy the goals of protection of society, deterrence of crime, rehabilitation of the offender, and retribution. *See State v. Izaguirre*, 145 Idaho 820, 821, 186 P.3d 676, 678 (Ct. App. 2008) (*rev. denied*); *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). As explained in the Opening Brief at pages 25-26, a 25 year fixed term was not needed to protect society because indications are that Mr. Stone is turning his life around and can be safely reintegrated into society before he is 67 years old. For the same reasons and also because of the unique circumstances of the current offense, a fixed term of 25 years is not necessary to deter Mr. Stone or others from criminal activity. Further, any rehabilitation will be the result of the programming the prison has to offer. Twenty-five years is undoubtedly longer than any rehabilitative programs available. And,

likewise, 25 years fixed exceeds any amount reasonable for retribution.

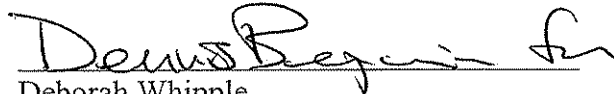
For these reasons, if the order denying withdrawal of the pleas is not granted, Mr. Stone asks that the order imposing sentence be reversed.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Stone requests that the order denying his motion to withdraw his guilty pleas be reversed and the matter remanded for further appropriate proceedings. In the alternative, Mr. Stone requests that the order imposing sentence be reversed.

Respectfully submitted this 23rd day of October, 2008.


Dennis Benjamin

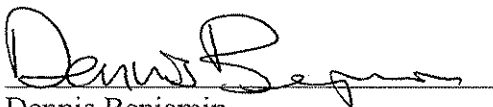

Deborah Whipple

Attorneys for Faron Stone

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of October, 2008, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid, and addressed to:

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